[Case Title] In re:Tax Shop, Inc., Debtor
[Case Number] 94-43245
[Bankruptcy Judge] Steven W. Rhodes
[Adversary Number]XXXXXXXXXX
[Date Published] September 29, 1994

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE:	173 B.R. 605
TAX SHOP, INC.,	Case No. 94-43245-R
Debtor.	Chapter 11
_____/	

AMENDED MEMORANDUM OPINION AND ORDER
DENYING DEBTOR'S MOTION TO REINSTATE

I.

The debtor has filed a Motion to Set Aside Dismissal, Reinstate Bankruptcy Petition, Extend Time to File Chapter 11 Documents and Waive Reinstatement Fee. The procedural history of this case leading up to this motion is as follows:

On March 28, 1994, the debtor filed this Chapter 11 bankruptcy case.

On April 8, 1994, the Court conducted an initial status conference with the debtor and the debtor's attorney. By written notice, the creditors had been invited to attend, but none attended. At the conference, the Court concluded that the case is a small Chapter 11 case,[1] and accordingly that certain

1 Exhibit A attached to the petition discloses assets of $84,941 and liabilities of $61,579, and that the debtor provides "Tax return preparation and accounting services."

expedited procedures should be utilized to secure the "just, speedy and inexpensive determination" of the case. Fed. R. Bankr. P. 1001. An "Order Establishing Deadlines and Procedures" was immediately entered and served on all parties in interest.[2] That order is attached as Appendix A.

The order set April 29, 1994, as the deadline for objections to the order, but neither the debtor nor any other parties filed any objections.

The order also set a deadline for the debtor to file a plan and disclosure statement for July 26, 1994, which was 120 days after the petition was filed.

The debtor did not file a plan by the deadline. Instead, on the deadline day, the debtor filed a motion to extend the time to file the plan. The motion requested a 60 day extension, based on the following allegations:

> 4. That at said hearing, counsel for debtor indicated to the Court that he may have difficulty meeting such deadline due to a trial which was scheduled on July 22, 1994, and other matters due at that time, which included an appeal brief.

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2 Credit for devising the procedures established in this order goes to Hon. Thomas A. Small, United States Bankruptcy Judge, Eastern District of North Carolina. See Hon. A. Thomas Small, Small Business Bankruptcy Cases, 1 Am. Bankr. Inst. L. Rev. 305 (Winter, 1993); Hon. Steven W. Rhodes, Eight Statutory Causes of Delay and Expense in Chapter 11 Bankruptcy Cases, 67 Am. Bankr. L.J. 287 at 306-7 and 313-4 (Summer, 1993).

> 5. That due to the above matters and his heavy workload, debtor's attorney has been unable to complete the combined Chapter 11 plan and disclosure statement.

The Court concluded that counsel's heavy workload was not a substantial cause for the relief sought, given the time allowed by the Court and the interests of the other parties in a prompt determination of the case. Accordingly, in an order dated August 2, 1994, the motion was denied.

On the same date, the Court entered an order to show cause why the case should not be dismissed or converted, because the debtor had not filed a plan by the deadline set by the Court.[3] See 11 U.S.C. § 1112(b)(4). A hearing was set for August 15, 1994 at 10:00 a.m. Notice was sent to the debtor's attorney and the U.S. Trustee.[4]

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3 The Court's authority to dismiss a Chapter 11 case sua sponte in appropriate circumstances is clear under 11 U.S.C. § 105(a), which grants bankruptcy judges the broad authority to take action "necessary or appropriate . . . to prevent an abuse of process." See In re Toibb, 902 F.2d 14 (8th Cir. 1990), rev'd on other grounds sub nom., Toibb v. Radloff, 111 S. Ct. 2197 (1991); Pleasant Point Apartments, Ltd. v. Kentucky Housing Corp., 139 B.R. 828 (W.D. Ky. 1992); In re Great Am. Pyramid Joint Venture, 144 B.R. 780, 789-90 (Bankr. W.D. Tenn. 1992); In re 266 Washington Assoc., 141 B.R. 275, 288 (Bankr. E.D.N.Y. 1992); Finstrom v. Huisinga, 101 B.R. 997 (D. Minn. 1989).

4 Rule 1017, Fed. R. Bankr. P. provides that a case shall not be dismissed for want of prosecution prior to a hearing on notice as provided in Rule 2002. Subsection (a)(5) of that rule requires 20 days notice by mail to all parties in interest of the hearing on dismissal or conversion. However, pursuant to

No one appeared at the hearing. The Court ordered dismissal of the case because the debtor did not file a plan by the deadline,[5] and because the debtor did not object to dismissal. A dismissal order was entered on August 15, 1994.

II.

The debtor filed its motion to reinstate on August 19, 1994. In the motion, the debtor's attorney stated that he was unable to meet the plan filing deadline because of his heavy work schedule and because "he had not received all of the financial information from the debtor necessary" to complete the plan. (Motion to Reinstate ¶ 5). The motion further stated (¶ 6) that the debtor was unable to complete the financial information because: (a) water had leaked through the roof of the debtor's premises and damaged its computer; and (b) the debtor's principal, Mr. Rucker, was ill during the last two weeks in July and the first two weeks in August and had been treated at a hospital

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Rule 9006(c)(1), the Court concluded that there was cause to reduce the time, due to the size of the case and the total lack of participation by creditors. In addition, pursuant to Rule 9007, the Court concluded that notice to the debtor and the U.S. Trustee would be sufficient, for the same reasons.

5 See Hall v. Vance, 887 F.2d 1041 (10th Cir. 1989); State St. Mortgage Co. v. Palmer (In re Palmer), 134 B.R. 472 (Bankr. D. Conn. 1991); In re Gusam Restaurant Corp., 32 B.R. 832 (Bankr. E.D.N.Y. 1983), rev'd on other grounds, 737 F.2d 274 (2d Cir. 1984); In re Kang, 18 B.R. 680 (Bankr. N.D. Ill. 1982).

emergency room on August 3, 1994. The motion also stated that the plan and disclosure statement had been filed on August 15, 1994 (¶ 11), and that counsel and the debtor appeared late for the show cause hearing on that date because counsel's secretary had mistakenly calendared the hearing for 10:30 a.m. (¶ 9).

III.

The Court recognizes that any request for delay in Chapter 11 cases is addressed to its sound discretion and that in exercising that discretion, the totality of the circumstances must be considered and no single factor is conclusive. In determining the dates and deadlines in the Chapter 11 case, the Court must consider that the bankruptcy process is intended to provide for the prompt determination of cases. See Rule 1001, Fed. R. Bankr. P., Katchen v. Landy, 382 U.S. 323, 328 (1966); Bailey v. Glover, 88 U.S. (21 Wall.) 342, 346-47 (1874); Ex parte Christy, 44 U.S. (3 How.) 292, 312-14, 320-22 (1845). Moreover, as noted in United Savings Association v. Timbers of Inwood Forest Associates, Ltd. (In re Timbers of Inwood Forest Associates, Ltd.):

> Early and ongoing judicial management of Chapter 11 cases is essential if the Chapter 11 process is to survive and if the goals of reorganizability on the one hand, and creditor protection, on the other, are to be achieved. In almost all cases the key to

> avoiding excessive administrative costs, which are borne by the unsecured creditors, as well as excessive interest expense, which is borne by all creditors, is early and stringent judicial management of the case.

United Savings Association v. Timbers of Inwood Forest Associates, Ltd. (In re Timbers of Inwood Forest Associates, Ltd.), 808 F.2d 363, 373 (5th Cir. 1987) (en banc), aff'd, 484 U.S. 365 (1988).

Nevertheless, the Court recognizes that delay in Chapter 11 is occasionally justified by special circumstances. Accordingly, in considering a request for delay in Chapter 11 cases, the Court will consider:

(1) The interests of the parties in a prompt determination of the case.

(2) The length of the delay requested.

(3) The justification asserted for the delay.

(4) Whether the circumstances leading to the request for the delay were foreseeable.

(5) Whether the length of the delay requested bears a reasonable relationship to the justification asserted.

(6) Whether the justification is supported by affidavit and is credible.

(7) Whether the debtor has made a good faith, diligent and

persistent attempt to reorganize and to meet the Court's deadlines.

(8) Any other relevant factor.

IV.

After considering these factors, the Court concludes that nothing in the motion to reinstate justifies the relief sought.

First, the Court affirms its previous conclusion that counsel's heavy workload, by itself, is not a sufficient reason to permit delay in this case. An attorney simply should not accept a case when prior responsibilities will not allow for proper representation.

Second, although the debtor's present motion asserts that the problems causing the delay resulted from the debtor's computer and Mr. Rucker's illness, neither of these difficulties were brought to the Court's attention in the original motion to extend the plan deadline. This lack of proper disclosure causes the Court to question the debtor's credibility on these points. Moreover, the Court notes that neither of the debtor's motions were supported by an affidavit.

Third, the alleged calendaring mistake by the debtor's attorney relating to the dismissal hearing certainly does not justify the failure to appear.

Fourth, while the special circumstances asserted by the debtor in the motion to reinstate (but not in the motion to extend) might have justified some short delay, these circumstances certainly would not justify a 60 day delay.

Fifth, the Court must conclude that the debtor has failed to demonstrate any persistent and diligent effort to reorganize and to comply with the Court's deadlines. Rather, the circumstances of this case reflect a pattern of inattention to and disrespect for this Court's orders and processes, which the Court cannot and will not condone.[6]

The Court concludes that there is no substantial basis for granting the debtor's motion to set aside the dismissal. Accordingly, the motion is denied.

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STEVEN W. RHODES
U. S. BANKRUPTCY JUDGE

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6 In addition to the circumstances described above which lead to this conclusion, the court file also reflects that the debtor did not file its April financial statements until July 28, 1994, which was two months late and actually after the plan deadline; that the debtor did not file its May financial statements until it filed its plan on August 15, 1994, which was also two months late; and that the debtor has never filed its June and July financial statements. Also, the debtor did not file its business plan until August 17, 1994, which was two and a half months late according to the United States Trustee's instructions, and actually after the reorganization plan.

Entered: _____